No. 282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

ALMA SCHULZ, Administratrix of the Estate of August M. Schulz,

Petitioner,

—*against*—

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JOSEPH P. ALLEN,
Attorney for Respondent,
Office & P. O. Address,
39 Broadway,
New York 6, New York

In the

Supreme Court of the United States

October Term, 1955

Alma Schulz, administratrix of the Estate of August M. Schulz,

Petitioner,

—against—

The Pennsylvania Railroad Company,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

Statutes Involved

In addition to the statutes set forth in the petition (pp. 2 and 3), the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 903 et seq. is also involved.

33 U. S. C. A. Section 903. *Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable water of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net, or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, § 3, 44 Stat. 1426.)

33 U. S. C. A. Section 905. *Exclusiveness of liability.* The liability of an employer prescribed in section 904 of this chapter, shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426.)

at the office or the dock (p. 3A); and locker and cafeteria facilities available ashore (p. 5A and p. 47A).

It was stipulated that the tugs Altoona, Princeton, Fort Wayne and Williamsport all exceeded [illegible] tons; that The Pennsylvania Railroad Company has secured payment for compensation as provided for in the Longshoremen's and Harbor Workers' Compensation Act; that The Pennsylvania Railroad Company has employees engaged in marine or maritime activities; and that the Hudson River is a navigable stream of the United States (p. 26A). The testimony substantiates the fact that the decedent's duties affected the interstate commerce aspects of the defendant's railroad business.

In essence the duties of a "watch-fireman" are comparable to that of a caretaker or watchman. It was the decedent's job to protect these four boats which were then tied up at the Pier by maintaining fires; keeping steam in the boilers; and in general protecting the property of the defendant (pp. 14a and 15a).

On December 25, 1949 at approximately 4:00 P. M. the decedent called his immediate supervisor, the witness James H. Corcoran, and advised him that he would be late for work (p. 4a). Mr. Corcoran advised the decedent to report anyway since there were no extra men available and the decedent's absence would leave the "middle trick", to which he had been assigned, short (p. 5a). Pending the arrival of the decedent, Mr. Corcoran assigned another watch-fireman, the witness Barker, to check the four boats to which the decedent would be assigned (p. 5a). At approximately 5:00 P. M. Mr. Barker, in accordance with his instructions, went aboard these four boats, checked the equipment and put coal on the fires of the three coal-burning tugs. He then reported back to the office (p. 33a).

The decedent reported in at approximately 5:30 P. M. After some preliminary conversations with Messrs. Corcoran and Barker, he apparently went on board the four boats to which he had been assigned and made a quick check-up of their conditions. He then reported back to Mr. Corcoran that he had checked his boats and that he was then going to change his clothes and go to work (p. 6a). The decedent was last seen walking down Pier H in the direction of the third tier in which his boats were moored (p. 6a). He was never seen alive again by anyone. On January 31, 1950 his body was found floating in the water, clad in shoes, socks and underwear, and clutching a flashlight in one hand (pp. 26a and 27a).

There is no evidence as to how, when or where the decedent met his death. At the conclusion of the trial the court granted the defendant's motion for a directed verdict on the grounds that there was a complete absence of proof which would establish that the death of the decedent was contributed to in whole or in part by negligence on the part of the defendant (p. 62a).

POINT I

THE PETITION SHOULD BE DENIED FOR THE REASON THAT THE QUESTIONS ALLEGED TO BE PRESENTED ARE NOT INVOLVED IN THIS CAUSE.

The first question stated in the Petition (Petition p. 2) is whether the Court of Appeals in the case at bar erroneously differed with the opinion of the Court of Appeals for the 4th Circuit in the case of *Sadler* v. *Pennsylvania Railroad*, 159 F. 2d 784 (C. A. 4th Cir.) which held that

proximate cause need not be established by direct evidence but may be proved by circumstances.

The question is not involved in this case.

The Trial Court (p. 62a) and the Court of Appeals for the 2nd Circuit (30a, 31a) both specifically held that there was no evidence, either direct or circumstantial, which could causally connect any negligence on the part of the respondent with the death of petitioner's intestate.

Neither the Trial Court nor the Court of Appeals for the 2nd Circuit indicated in any way that a causal relationship between negligence and death could not be established by circumstantial evidence. Both courts held that in the absence of any evidence on this point a defendant in an action under the Jones Act (48 USCA 3688 *et seq.*) is entitled to a directed verdict.

Sadler v. *Pennsylvania Railroad*, *supra*, p. 5, is clearly distinguishable from the case at bar on its own peculiar facts since in the *Sadler* case, *supra*, p. 5, the plaintiff's decedent was found treading water between two barges at a point near a broken guard rail on the barge on which the decedent had been working. At the point near the broken rail there was admittedly no illumination. Hence, it was a reasonable inference that the lack of illumination at that point contributed to the decedent's fall through the guard rail. In the case at bar there is no evidence as to how or where the accident occurred and it is impossible to say that the decedent's demise was proximately caused by any default on the part of the defendant.

The second question presented in the Petition (Petition p. 2) is whether or not the Court of Appeals in the case at bar erroneously deviated from the principle of law established by this court in the case of *Lavender* v. *Kurn*, 327 U. S. 645.

This question is not involved in this case either.

In *Lavender v. Kurn, supra*, there was an evidentiary basis for the jury to conclude that the negligence of the defendant proximately caused the death of the plaintiff's decedent. Neither the Trial Court nor the Court of Appeals in the case at bar have determined that, if there is an evidentiary basis for a jury verdict, a case can be taken away from the jury. In the case at bar both the Trial Court and the Court of Appeals determined that there was no evidentiary basis upon which a jury could reasonably conclude that the alleged negligence of the defendant was causally related to the death of the decedent. In *Lavender v. Kurn supra*, this court recognized that, for a plaintiff to succeed in the type of action presented in the case at bar it must be established that some negligence on the part of the defendant contributed to or caused the death or injuries of the plaintiff. In the case at bar there is no evidence, direct or circumstantial, that any negligence on the part of the defendant contributed to or caused the death of the plaintiff's intestate.

The case at bar presents no general principle, no important federal question, and no conflict between courts for review. Only the application of well-settled rules to particular facts is involved.

CONCLUSION

THE PETITION FOR THE WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

JOSEPH P. ALLEN,
Attorney for Respondent.